CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 17/MP/2019

Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S.Jha, Member

Date of Order: 19th August, 2019

In the matter of

Petition under Section 79(1) (b) read with Section 79(1) (f) of the Electricity Act, 2003, *inter alia*, seeking compensation on account of occurrence of Change in Law events relating to Power Purchase Agreements dated 18.12.2013 and 19.12.2013 entered into between the Petitioner and the Respondents.

And
In the matter of

Adhunik Power and Natural Resources Limited
9B, 9th Floor,
Hansalaya Building
15, Barakhamba Road, Connaught Place,
New Delhi- 110001 **.....Petitioner**

Vs

1. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai-600 002, Tamil Nadu

2. PTC India Limited
2nd Floor, NBCC Tower 15,
BhikajiCama Place,
New Delhi-110066 **... Respondents**

Parties Present:

Shri Deepak Khurana, Advocate, APNRL
Shri Amit Griwan, APNRL
Shri Smarjit Sahoo, APNRL
Shri S. Vallinayagam, Advocate, TANGEDCO

ORDER

The Petitioner, Adhunik Power and Natural Resources Limited (APNRL), has developed a 540 MW Thermal Power Project (hereinafter referred to as the 'generating

station") in District Saraikela-Kharswan in the State of Jharkhand. The Petitioner has entered into the following Power Purchase Agreements (PPA) for supply of power from the generating station:

(a) Supply of 122.85 MW to Jharkhand Bijili Vitran Nigam Limited in terms of PPA dated 28.9.2012;

(b) Supply of 100 MW to Tamil Nadu Generation and Distribution Corporation Limited through PTC in terms of PPA dated 19.12.2013;

(c) Supply of 100 MW to West Bengal State Electricity Distribution Company Limited through PTC in terms of PPA dated 25.3.2011; and

(d) Supply of additional 66 MW to Jharkhand Bijili Vitran Nigam Limited in terms of PPA dated 6.11.2017.

Background

2. On 18.12.2013, Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and the Respondent No. 2, PTC entered into a Power Purchase Agreement for supply of 100 MW power for a period of fifteen years for meeting TANGEDCO`s base load power requirements. On 19.12.2013, the Petitioner entered into back to back PPA dated 19.12.2013 with PTC.

3. Subsequently, the Petitioner participated in the auction under SHAKTI Scheme and offered a discount of three paise per kWh for securing coal linkage for supply of power to the extent of coal supplied under the SHAKTI Scheme. This Commission vide order dated 18.5.2018 in Petition No. 84/MP/2018 approved the Supplementary PPAs dated 8.5.2018 and 10.5.2018 executed between the Petitioner and PTC; and PTC and TANGEDCO respectively.

4. The chronological dates of events with regard to the TANGEDCO PPA are as under:

Power Supply to	**TANGEDCO under Long term (100 MW)**
Cut-off date	27.2.2013
Date of submission of bid	6.3.2013
PPA between PTC and TANGEDCO	18.12.2013
Back to back PPA executed by the Petitioner with PTC	19.12.2013
Start of supply of power	From 1.1.2016

5. The Petitioner has sought for the following reliefs under change in law in respect of TANGEDCO PPA:

(a) Increase in the Rate of Royalty towards contribution to the National Mineral Exploration Trust and District Mineral Foundation.

(b) Increase in Sizing charges on Coal.

(c) Increase in Surface Transportation Charges.

(d) Increase in Clean Energy Cess.

(e) Levy of Busy Season Charges & Levy of Development Surcharge.

(f) Introduction of Service Tax on Transportation of coal by Rail and Road

(g) Introduction of Goods and Service Tax (GST) on coal.

(h) Levy of Evacuation Facility Charges.

(i) Levy of Management Fee.

(j) Increase in Value Added Tax (VAT) on account of changes in individual components of tax.

(k) Increase/change in Central Excise Duty on account of changes in individual components.

(l) Carrying cost.

6. The Petitioner has submitted that during the period commencing from 1.1.2016 to 30.9.2018, it has already incurred additional expenditure of Rs. 85.93 crore on account of the various change in law events.

7. The Petitioner has submitted that the events of change in law have significant adverse financial impact on the costs and revenue of the Petitioner during the operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of the PPA. The Petitioner has submitted that in order to offset the impact on account of change in law events and to ensure continuous, uninterrupted and reliable supply of electricity to the Respondents as well as to restore the Petitioner to the same economic position as on cut-off date, the Commission may in exercise of its regulatory power, grant additional tariff over and above the tariff decided under the PPAs to compensate for increased cost. Accordingly, the Petitioner has made the following prayers:

> *"(a) Hold and declare that the events enumerated in the Petition constitute Change in Law events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said change in law events;*
>
> *(b) Direct the Respondents to make payment of Rs. 85.93 crore to the Petitioner towards the additional expenditure incurred by the Petitioner on account of change in law enumerated in the Petition in supplying power to the Respondents under the PPAs from 1.1.2016 to 30.9.2018;*
>
> *(c) Grant carrying cost @1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;*
>
> *(d) Direct the Respondents to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petitioner from 30.9.2018 up to the effect of the said change in law events; and*
>
> *(e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 77.337 crore, i.e 90% of the already incurred amount by the Petitioner from 1.1.2016 to 30.9.2018 towards supply of power to the Respondents."*

8. The matter was admitted on 7.2.2019 and notices were issued to the Respondents to file their replies to the Petition. Reply to the Petition has been filed by the Respondents, TANGEDCO and PTC.

Reply of TANGEDCO

9. TANGEDCO, in its reply dated 22.5.2019, has mainly submitted as under:

(a) The Petitioner sent notice dated 10.2.2017 with details of change in law events which occurred after the cut-off date. However, the Petitioner filed the present Petition claiming change in law compensation on 11.1.2019. The Petitioner has not explained the reasons for delay and laches on its part in filing the Petition after two years of sending notice for change in law.

(b) Article 9.5.1 of the PPA provides that the affected party shall give notice to the other party of any events of force majeure as soon as reasonably possible, but not later than six days after cut-of date. However, the Petitioner gave notice on 10.2.2017 which is not as per the provisions of the PPA.

(c) Change in law compensation is a pass through in the general tariff. The Petitioner cannot be permitted to make its claim under change in law for compensation for the period from 2013 in the year 2019. The TANGEDCO cannot recover change in law claims of the year 2013 in its ARR for the year 2019-20.

(d) The Petitioner has claimed change in law compensation in respect of change in law events without documents regarding loss/ additional expenses incurred in this regard. The PPA does not provide for any claim without there being supporting documentary evidence in respect of the supplementary bills raised by the Petitioner due to change in law events.

(e) The Petitioner has sought declaration to the effect that events enumerated in the Petition are change in law events within the meaning of Article 10 of the PPA. Article 10 of the PPA is an enabling provision subject to the other provision of the PPA. No compensation can be sought without establishing and proving that the expenditure was actually incurred by the Petitioner.

(f) The prayer (b) of the Petitioner is not substantiated by any calculation placed on record. The Petitioner is required to place on record the components of the energy charges quoted in its bid and agreed to under the PPA.

(g) The Petitioner is not entitled to claim any amount on account of change in law as the escalation indices published by the CERC allegedly factors in or takes into account the statutory taxes, duties and levies as part of the quoted tariff."

Reply of PTC

10. PTC in its reply dated 14.5.2019 has submitted that PTC having a licence to trade in inter-State supply of electricity had entered into back to back agreements for purchase and sale of power. Therefore, the entire transaction was on back to back basis. The Commission may examine the issues as raised by the Petitioner in light of the applicable laws and Regulations.

Rejoinder of the Petitioner

11. The Petitioner in its rejoinder dated 25.5.2019 has submitted as under:

(a) The principle of delay and laches is only applicable in case of inordinate delays, which is not the present case. The present Petition is based on continuing cause of action and the question of delay and latches does not arise. There is no provision in the PPA prescribing the time period for filing the Petition. Different generators have filed Petitions at different point of time and that does not mean that the Petitioner cannot file Petition subsequent to such filing by other generators. The Petitioner has approached the Respondents for payment of change in law bills raised by the Petitioner. However, TANGEDCO informed the Petitioner that any claim for change in law can be entertained by the Respondents after the approval from the Appropriate Regulatory Commission. Therefore, the Petitioner has filed the present Petition.

(b) The contentions of TAGNEDCO that the Petitioner cannot be permitted to make claim under change in law for compensation for the period from 2013 to 2019 in the year 2019 and that it cannot recover change in law claims of the year 2013 in its ARR are factually incorrect as the claims of the Petitioner are from the 1.1.2016 onwards. The supply of power itself commenced on 1.1.2016. There is no provision in the PPA which makes change in law claims dependant on the ARR of TANGEDCO. The approval of tariff and escalation indices have no co-relation with the change in law provisions. TANGEDCO is trying to mix-up two independent and distinct provisions of the PPA and to wriggle out of its obligation to pay change in law claims under the PPA.

(c) As regards the contention of TANGEDCO that the Petitioner has sought number of prayers in one single Petition and that the same has been done to avoid court fees, is erroneous. The claims raised by the Petitioner are within the contours of Article 10 of the PPA.

(d) The Petitioner has placed on record the supporting documents/ proofs of occurrence of the change in law events as well as the amount/ expenses and the calculations for such change in law events.

(e) TANGEDCO has not pointed out as to what are the components which are allegedly escalated along with the base price of coal by virtue of escalation indices notified by the CERC. The escalation indices published by CERC reflect only a revision (increase or decrease) in the base price or run of mine price of coal and does not consider/ factor in any revision in the statutory taxes, levies or duties on the said base price or run of mine price of the coal. Therefore, the impact of such statutory taxes, levies or duties is to be considered as per the change in law provisions contained in the PPA. The provisions relating to both the WPI as well as the change in law events and the consequent compensation are contained in the PPA separately, which shows that the increase/ decrease on account of WPI and increase/ decrease in expenditure on account of change in law are distinct from each other.

(f) Taxes, duties and levies, etc. prevailing as on the cut-off date were factored in the energy charge quoted by the Petitioner in accordance with clause 2.1.4.1 B(xi) of the RFP. It is for this reason that the bidder had factored in the said components as on the cut-off date and any increase or decrease in the same after the cut-off date and on account of change in law events is to be taken into consideration and any additional expenditure resulting therefrom is to be reimbursed to the generator. This is the basic concept and purpose of change in law provisions and the contentions raised by TANGEDCO run contrary to this concept. A bare perusal of the above would make it abundantly clear that clause 2.4.1.1 B(xi) of the RFP can in no manner be construed to make Article 10 of the PPA redundant and inapplicable. In support of its contention, the Petitioner has relied upon the APTEL`s judgment dated 19.4.2017 in Appeal Nos. 161/2015 and 205/2015.

(g) The escalation percentages/ indices published by this Commission does not take into consideration the increase in the expenditure being incurred by the generator (Petitioner) in generation and supply of power on account of the change in law events under the PPA. The escalation indices published from time to time and increase of cost of generation and supply of electricity on account of the change in law events are two different aspects altogether. The escalation indices do not consider the increase on account of new/ additional taxes, levies, duties or any other change in law events having an impact on the cost of generation and supply of electricity. Therefore, it is wrong to contend that interest of generator is taken care by the said indices, while ignoring the impact of change in law event.

(h) The contention of TANGEDCO that as per Article 15.18.1 of the PPA, the Petitioner is liable to pay the taxes, levies or duties and cess, is misconceived. The said provisions refer to the taxes, levies and duties, etc., which were prevailing as on the cut-off date. Any revision in the same is covered under change in law clause. If interpretation of Article 15 as proposed by TANGEDCO is accepted, it would not only be absurd and illogical, but would also render the provisions of Article 10 of the PPA pertaining to change in law absolutely redundant and nugatory. Article 10 of the PPA is direct and specific provision whereas Article 15 of the PPA is a miscellaneous provision. It is settled law that where there is a specific provision in the contract dealing with the particular subject, the said specific provision would override the general provision contained in the PPA. Article 8.3.6(h) of the PPA also recognises that additional expenditure (compensation) on account of change in law is to be paid by the Respondent, TANGEDCO to the Petitioner. The language of Article 15.18 of the PPA that '*all statutory taxes, duties, levies and cess assessed/ levied on the seller, contractors on their employees*' clearly suggests that the taxes and duties, etc. covered under the said provision are taxes and cess, etc. which are purely personal in nature to the Petitioner (such as income tax) or arising out of the arrangement of the Petitioner with its contractors or their employees. Article 15.18.1 qualifies the stipulation of payment of taxes, etc. by the Petitioner with the expression "as per the terms of this Agreement". One of the terms of the Agreement i.e. Article 10 of the PPA provides that on account of change in law events, (including any change in tax or introduction of new tax), the Petitioner shall be compensated for any increase in expenditure. Therefore, Article 15.18 itself provides that the stipulation in the said

Article for payment of taxes, etc. by the Petitioner is to be considered and interpreted in light of provisions contained in Article 15.18 of the PPA.

(i) The reliance placed by TANGEDCO on the judgment of the Hon`ble Supreme Court in Bharat Aluminium Company vs. Kaiser Aluminium Technical Services [(2016) 4SCC 126] is wholly misplaced and is not applicable in the present case.

Analysis and Decision

12. Since there are no objections with regard to jurisdiction and the maintainability of the Petition, we proceed to examine the issues raised by the Petitioner, on merits.

13. After consideration of the submissions of the Petitioner and the Respondents, the following issues arise for our consideration:

(a) Whether the Petition suffers from delay and laches?

(b) Whether the provisions of the PPA with regard to notice have been complied with?

(c) What is the scope of Change in law in the PPA?

(d) Whether compensation claims are admissible under Change in Law in the PPA?

(e) Mechanism for processing and reimbursement of admitted claims under Change in Law.

The above issues have been dealt with in the succeeding paragraphs.

Issue No. 1: Whether the Petition suffers from delay and laches?

14. The Respondent, TANGEDCO has contended that the claims made by the Petitioner are hit by delay and laches as the Petition has been filed after two years of sending the notice for change in law. The Petitioner, by not filing the Petition seeking compensation in time as done by other generators, has waived its entitlement to seek change in law compensation under the PPA. The Respondent has submitted that as per

Article 9.5.1 of the PPA, the affected party is required to give notice as soon as reasonably possible, but not later than six day after the due date on which such party knew or should reasonably have known of the commencement of the event of change in law. The Respondent has further submitted that the notice was given by the Petitioner on 10.2.2017 regarding change in law events due to the Government instrumentality dated 27.2.2013 onwards and on the ground of cancellation of tapering linkage from 24.1.2014. The said notice is not as per the terms of the PPA. Both parties to the contract are bound by the terms and conditions of the PPA and no party can take benefit of delay or latches on its part by making a belated claim before this Commission. The Respondent has submitted that it is a well-known fact that the change in law compensation is a pass through in the general tariff.

15. *Per contra*, the Petitioner has submitted that the principle of delay and latches is only applicable in case of inordinate delay, which is not there in the present case. Different generators have filed Petitions at different point of times. That does not mean that the Petitioner cannot file its Petition subsequent to such filing by other generators.

16. We have considered the submissions of the Petitioner and the Respondent. The Electricity Act, 2003 (hereinafter referred to as the Act) is a special statute which does not provide for any period of limitation for adjudication of claims by this Commission. Though no period of limitation has been prescribed in the Act for filing Petitions for adjudication of disputes, the Hon`ble Supreme Court in Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468] held that the claims coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation. Relevant extract of the said judgment is as under:

"30…In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view."

17. In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable for filing the application before the Commission. However, under Section 5 of the Limitation Act, 1963, the delay may be condoned for sufficient cause. In the present case, supply of power under PPA commenced from 1.1.2016 and present Petition has been filed by the Petitioner on 11.1.2019. There is delay of 11 days in filing the present Petition. It is noted that the Petitioner vide its letter dated 10.2.2017 raised the invoices towards reimbursement of additional cost incurred on account of change in law events and requested to reimburse the same. In response, PTC vide its email dated 13.4.2017 rejected the claims of the Petitioner and informed that the Petitioner is required to raise the change in law invoices after approval of change in law events by the Appropriate Commission. Accordingly, the Petitioner has approached the Commission for approval of the Change in Law events in terms of the PPA. Since, claims of change in law event is based on continuing cause of action as the supply of power is continuous in nature throughout the term of the PPA, we feel it is a fit case for condonation of delay. Accordingly, we condone delay of eleven days for filing the present Petition for adjudication of dispute with regard to change in law events.

Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?

18. The claims of the Petitioner in the present Petition pertain to Change in law events related to the PPA dated 18.1.2013. Article 10.4 of the PPA is extracted as under:

"10.4 Notification of Change in Law

10.4.1. If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:-

(a) The Change in Law; and
(b) The effects on the Seller."

19. The Petitioner gave notice to the Respondent, PTC on 10.2.2017 regarding change in law events claimed in the Petition in respect of the PPA dated 19.12.2013 executed between the Petitioner and PTC and PPA dated 18.12.2013 executed between the TANGEDCO and PTC.

20. Under Article 10.4.2 of the PPA, the Petitioner is required to serve notice about occurrence of change in law events as soon as practicable after being aware of such events. The Petitioner has given notice as stated above to the Procurers indicating the above change in law events. Through the said notice, the Petitioner has appraised the Respondents about the occurrence of change in law events and the impact of such event of tariff. PTC vide its email dated 13.4.2017 informed the Petitioner to submit the change in law invoices after approval of the change in law events and relief by the Appropriate Regulatory Commission. Thereafter, the Petitioner has filed the present Petition for seeking approval for change in law events. In our view, the Petitioner has complied with the requirements of Article 10.4.2 of the PPA.

Issue No.2: What is the scope of Change in Law in the PPA?

21. The Petitioner has approached the Commission under Article 10 of the PPA read with Section 79 of the Act for adjustment/ compensation to offset the financial/ commercial impact of change in law during the operating period along with carrying cost.

22. Article 10 of the PPA dealing with the events of Change in law is extracted as under:

"10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:-

• the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;

• a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;

• the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;

• a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;

• any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of change in law

10.2.1 While determining the consequence of Change in Law under this Article 10, the parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

10.3 Relief for Change in Law
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10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of

an amount equivalent to 1% of the value of the Standby Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law."

The term "Law" has been defined under Article 1.1 of the PPA as under:

"Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission."

The term "Indian Governmental Instrumentality" is also defined in Article 1.1 as under:

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of state of Tamil Nadu, Jharkhand and New Delhi; and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer."

23. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and TANGEDCO with regard to 'Change in Law' events which occur after the cut-off date and which is seven days prior to the bid deadline. The events broadly covered under 'Change in Law' are as under:

(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or

(b) Any change in interpretation of any Law by a Competent Court of law, Tribunal or Indian Governmental Instrumentality acting as final authority under law for such interpretation, or

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the settler.

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner to TANGEDCO as per terms of the Agreement.

(f) Such Changes (as mentioned in (a) to (c) above) result in additional recurring and non-recurring expenditure by the seller or any income to the seller.

(g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in Article 10, the affected Party to the same economic position as if such "Change in Law" has not occurred.

(h) The Petitioner shall provide to the Procurer and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law;

(i) The decision of the Commission with regard to the determination of compensation and the date from which such compensation shall become effective shall be final and binding on both the parties, subject to rights of appeal provided under Electricity Act, 2003.

(j) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller (Petitioner) in excess of an amount equivalent to 1% of the value of the standby Letter of Credit in aggregate for the relevant Contract Year.

Issue No. 4: Whether compensation claims are admissible under Change in Law in the PPA?

24. The Bid deadline and the cut-off date in respect of the PPAs dated 18.12.2013 and 19.12.2013 are as under:

Bid Deadline date	6.3.2013
Cut-off date (seven (7)	27.2.2013

days prior to the Bid deadline)	

25. The Petitioner has raised claims under Change in Law in respect of events during the operating period, namely increase in the rate of royalty, contribution to the National Mineral Exploration Trust, contribution to the District Mineral Foundation, increase in sizing charges on coal, increase in surface transportation charges, increase in Clean Energy Cess, increase in Busy Season Charges on transportation of coal by Rail, Introduction and enhancement of service tax on transportation of coal by Rail and Road, Increase in Development Surcharge, Introduction of Goods and Service Tax (GST) on coal, levy of Evacuation Facility Charges, Levy of Management Fee, Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of tax and increase/ change in Central Excise Duty on account of changes in individual components as well as carrying cost on the above elements.

26. TANGEDCO has contended that the Petitioner cannot be permitted to make its claim under change in law for compensation for the period from 2013 to 2019 in the year 2019 and that the Respondent cannot recover the change in law claims of the year 2013 in its ARR for the year 2019-20. Per contra, the Petitioner has submitted that the allegation of TANGEDCO that it would not be able to recover its claim in the ARR is baseless and misconceived. The Petitioner has submitted that under regulatory practices, the Petitioner can claim prior period expenses or any such expenses which become payable pursuant to any legal decision.

27. We have considered the submissions of the Petitioner and TANGEDCO. As per the PPA, the adjustment in monthly tariff is effective from the date of change in law events. We are in agreement with the contention of the Petitioner that there is no provision in the PPA

which makes change in law claims dependent on the ARR of TANGEDCO. Therefore, the contention of TANGEDCO on this count is not sustainable.

28. The Respondent, TANGEDCO has submitted that clause 2.4.1.1 B(xi) of the RFP provides that the bidder shall take into account all charges including capital and operating charges, statutory taxes, levies and duties while quoting the bid. The Respondent has further submitted that the escalation indices published by the CERC also factors in and takes into account the statutory taxes, duties and levies as part of the quoted tariff. Therefore, the Petitioner is not entitled to claim any amount on account of change in law. Clause 2.4.1.1 B(xi) of the RfP provides as under:

> *"xi. The quoted Tariff, as in format 4.10, shall be an inclusive Tariff up to the Interconnection Point and no exclusions shall be allowed. The Bidder shall take into account all cost including capital and operating costs, statutory taxes, levies duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from the generation source up to the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the Quoted Tariff. Appropriate transmission charges from the Injection Point to the Delivery Point as per Format 5.10 shall be added for Bid evaluation purpose."*

29. In response, the Petitioner in its rejoinder has submitted that the escalation indices published by this Commission reflects only a revision (increase or decrease) in the base price or run of mine price of coal and does not factor in any revision in the statutory taxes, levies or duties on the said base price or run of mine price of the coal or related to procurement of coal. Therefore, the impact of such statutory taxes, levies or duties is to be considered as per the change in law provision contained in the PPA. The Petitioner has submitted that provisions relating to both the WPI as well as the change in law events and the consequent compensation are contained in the PPA separately, which itself shows that the increase/ decrease on account of WPI and increase/ decrease in expenditure on account of change in law are distinct from each other. The Petitioner has submitted that taxes, duties and levies, etc. prevailing as on the cut-off date were factored in the energy

charge quoted by the Petitioner in accordance with Clause 2.4.1.1 B(xi) of the RFP. Therefore, any increase or decrease in the same after the cut-off date on account of change in law event is to be taken into consideration and any additional expenditure resulting therefrom is to be reimbursed to the generator. It has been further submitted that the escalation index published by the Commission does not take care of Change in law events and therefore, the Petitioner is not put in the same economic position as if Change in law had not occurred.

30. We have examined the submissions of the Petitioner and Respondent, TANGEDCO. The contention of the Respondent is that any increase in duties and levies are covered in escalation index issued by the Commission and, therefore, it cannot be allowed as Change in law. We are unable to accept this contention as the escalation indices notified by this Commission consider only the changes in base price of fuel and base railway freight rates and does not include any change in the rates of taxes, duties and cess. The Respondent has further argued that as per RFP, the bidder is expected to take into account all cost within statutory taxes, levies, duties while quoting the tariff and since the quoted tariff includes taxes, duties and cess assumed at the time of bid, the successful bidder gets escalation on the taxes, duties and cess also. In our view such an approach, if accepted, will lead to reopening of the bid which is not permissible in terms of the judgment of the Appellate Tribunal dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:

> *"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation of any escalable*

index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind."

31. In view of the above, we find no reason to accept the contention of TANGEDCO that the Petitioner is not entitled for any increase or decrease for taxes and duties in terms of clause 2.4.1.1 B(xi) of RFP.

32. The Respondent, TANGEDCO has further submitted that in terms of Article 15.18.1 of the PPA, the Petitioner is required to bear and promptly pay all statutory taxes, levies or duties in relation to execution of the agreement and for supplying power as per the terms of the Agreement. TANGEDCO has further submitted that as per Article 15.18.1 of the PPA, the Petitioner is also required to indemnify the procurer and hold him harmless against any claim that may be made against procurer in relation to matters set out in Article 15.18.1. TANGEDCO has submitted that Article 10 deals with change in law. However, Article 15.18.1 deals with obligation to seller to keep the procurer indemnified in the event of increase in tax, levies and duties/ cess. Neither Article 10 nor Article 15 precludes the application of one on the other. TANGEDCO, in support of its contention, has relied upon the Hon`ble Supreme Court judgment in the case of Bharat Aluminium Company Vs. Aluminium Technical Services Inc [(2016) 4 SCC 126] and has submitted that if the Petitioner claims relief under Article 10 of the PPA, then the Petitioner is bound to give effect to the provisions contained in Article 15 of the PPA.

33. *Per contra*, the Petitioner has submitted that interpretation of Article 15 as canvassed by TANGEDCO is fallacious, erroneous and misconceived. The said provisions refer to the taxes, levies and duties, etc. which were prevailing as on the cut-off date. Any revision in the same is covered under change in law clause. If interpretation as proposed by TANGEDCO is placed on Article 15, it would not only be absurd and illogical, but would also render the provisions of Article 10 of the PPA pertaining to change in law absolutely

redundant and nugatory. Where there is a specific provision in the contract dealing with a particular subject, the said specific provision would override the general provision contained in the PPA. The Petitioner has submitted that Article 15.18.1 of the PPA qualifies the stipulation of payment of taxes, etc. by the Petitioner with the expression 'as per the terms of this Agreement'. One of the terms of the Agreement i.e. Article 10 of the PPA provides that on account of change in law events, including any change in tax or introduction of new tax, the Petitioner shall be compensated for any increase in expenditure. Therefore, Article 15.18 of the PPA itself provides that the stipulation in the said Article for payment of taxes, etc. by the Petitioner to be considered and interpreted in light of the provisions in Article 15.18 of the PPA. The APTEL in its judgment dated 19.4.2017 in Appeal Nos. 161/2015 and 205/2015 has held that the terms of the PPA have to be read together and not in isolation with each other. Therefore, if an event qualifies as a change in law event then the compensation must follow and in case the contention of TANGEDCO is accepted, it will render the change in law clause redundant and otiose.

34. We have considered the submissions of the Petitioner and the Respondent, TANGEDCO. Article 15.18.1 provides that the seller shall bear all charges that are required to be paid by the seller for supply of power as per the terms of the agreement. There is no non-obstante clause in this Article which will prevent operation of Article 10 of the PPA. A harmonious construction of both Articles reveals that while the taxes, cess, duties and levies, etc. shall be payable by the seller, the same to the extent permissible under Change in Law provision can be recovered from the procures. The reliance placed by the TANGEDCO on the judgment of the Hon`ble Supreme Court in Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services is not applicable to the present case. In the said judgment, the Hon`ble Supreme Court observed that the interpretation of a

contract shall be as a whole and not in isolation and further that the contract has to be interpreted in a logical manner. Accordingly, the objection of TANGEDCO in this regard is rejected.

35. TANGEDCO has submitted that the Petitioner has not placed on record the documents regarding calculation and quantified its claims. *Per contra*, the Petitioner has submitted that the contention in Para 24 of the reply of TANGEDCO regarding documents is beyond the terms of the PPA. Furnishing of any such calculation is not stipulated under the PPA. We have considered the submissions of the both parties. It is noted that the Petitioner has submitted the supporting documents for occurrence of each of the change in law events in the present Petition as well as the amounts/ expenses and the calculations for such change in law events. The Petitioner's claims shall be dealt in accordance with law. Therefore, the objection of TANGEDCO is rejected in this regard.

36. Accordingly, we proceed to adjudicate the various change in law events claimed by the Petitioner.

(A) Increase in the rate of Royalty

37. The Petitioner has submitted that as on the cut-off date, i.e. 27.2.2013, the rate of royalty payable was 14% *ad-valorem* on the price of coal. Subsequently, on 26.3.2015, the Government of India, Ministry of Coal amended the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (creation of DMF) and Section 9C (Creation of NMET) were introduced. Pursuant to Mines and Minerals (Development and Regulation) Amendment Act, 2015, on 20.10.2015, Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and as per Rules 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease was, in addition to the DMF, required to pay an amount at the rate of (a) 10% of the royalty paid in

terms of second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 in respect of mining lease, or as the case may be, prospecting licence-sum-mining lease granted on or after 12.1.2015, and (b) 30% of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining lease granted before 12.1.2015. Subsequently, the Ministry of Mines, vide its Notification No. GSR 837 (E) dated 31.8.2016 by amending the Notification dated 20.10.2015, imposed additional levy on retrospective basis from 12.1.2015.

38. The Petitioner has submitted that the Hon`ble Supreme Court vide its judgment dated 13.10.2017 in Transferred Case (Civil) No. 43 of 2016 has quashed the Notification No. GSR (E) dated 31.8.2016 and held that the effective date for levy of such contribution is 20.10.2015 (for coal) or the date when the establishment of DMF is notified by the State Government, whichever is later. In the present case, the DMF was notified by the State Government of Jharkhand on 22.3.2016 whereas the DMF was established on 12.1.2015. Therefore, the effective date of levy of such contribution is 22.3.2016. The Hon`ble Supreme Court further observed that no refund will be given to those parties which have paid the contribution for the period determined but the amount already paid will be adjusted against future contribution. The Petitioner has submitted that the above amount was imposed, in addition to the Royalty, to be paid towards the contribution to the DMF of the district in which the mining operation is carried out.

39. The Petitioner has submitted that the above notifications pertaining to the royalty and additional levy are Change in Law events within the meaning of Article 10 of the PPA. Accordingly, as per Article 10 of the PPA, the Petitioner needs to be compensated for increase in the cost of coal occasioned due to the said enhancement of the rate of royalty i.e., from 14% ad valorem on the price of coal to 18.48% ad valorem on the price of coal

[14% existing royalty + 0.28% (2% of 14% existing royalty) + 4.20% (30% of 14% existing royalty) = 18.48%].

40. The Petitioner has claimed a compensation of Rs.17.65 crore on account of the increase in rate of royalty of coal on account of NMET and DMF from 1.1.2016 to 30.9.2018.

41. As regards the admissibility of claim on account of royalty paid to the DMF and NMET, the issue was examined by the Commission vide order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

> "*32. We have considered the submissions of the Petitioner and the respondents. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:*
>
> > "*9B. District Mineral Foundation: (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation*
> >
> > *(2) The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operation in such manner as may be prescribed by the State Government.*
> >
> > *(3) The composition and functions of the District Mineral Foundation shall be such as may be prescribed by the State Government.*
> >
> > *(4) The State Government while making rules under sub-section (2) and (3) shall be guided by the provisions contained in Article 244 read with Fifth and Sixth Schedules to the Constitution relating to administration of the Scheduled Areas and Tribal Area and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.*
> >
> > *(5) The holder of mining lease or a prospecting licence-cum-mining lease granted on or after the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, shall in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operation are carried on, an amount which is equivalent to such percentage of the royalty paid in terms of the Second Schedule, not exceeding one third of such royalty, as may be prescribed by the Central Government.*
> >
> > *(6) The holder of mining lease granted before the date of commencement of the Mines and Mineral (Development and Regulation) Amendment Act, 2015, shall, in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operations are carried on, an amount not exceeding and royalty paid in terms of the Second Schedule in such manner and subject to the categorization of the mining*

leases and the amounts payable by the various categories of leaseholders, as may be prescribed by the Central Government."

Section 9C provides as under:

"9C: National Mineral Exploration Trust: (1) The Central Government shall, by notification, establish a Trust, as a non-profit body, to be called the National Mineral Exploration Trust.

(2) The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government.

(3) The composition and function of the Trust shall be such as may be prescribed by the Central Government.

(4) The holder of a mining lease or a prospecting licence-cum-mining lease shall pay to the Trust, a sum equivalent to two percent of the royalty paid in terms of the Second Schedule, in such manner as may be prescribed by the Central Government."

33. The Central Government in exercise of powers under sub-section 9B of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 prescribing the amount of contribution that will be made to the District Mineral Foundation as under:

"Amount of Contribution to be made to District Mineral Foundation.- Every holder of mining lease or a prospecting licence-cum-mining lease, in addition to royalty, pay to the District Mineral Foundation of the district in which mining operations are carried on, an amount at the rate of- (a) ten percent of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957) (herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and

(b) thirty percent royalty paid in terms of the Second Schedule to the said Act in respect of mining leases granted before 12th January, 2015."

It is noticed from the above provisions that through an amendment to Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provided for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. The Respondents have submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on to the Respondents. The Petitioner has submitted that the Petitioner is required to pay contribution at the prescribed rate to the National

Exploration Trust and District Mineral Foundations in addition to royalty. The question therefore arises whether the contribution to National Exploration Trust and District Mineral Foundation Trust shall be borne by the lease-holder of the mines or shall be passed on to the procurers under change in law. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government and the Commission has allowed the increase in royalty on coal under Change in Law in order dated 30.3.2015 in Petition No.6/MP/2013. Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law."

42. The above decision is applicable in case of the Petitioner. Therefore, the levy of royalty @2% royalty on National Mineral Exploration Trust and @10% or 30% of the royalty of District Mineral Foundations is admissible as Change in Law events.

43. In terms of the judgment of APTEL in Appeal No. 288 of 2013 (M/s Wardha Power Company Ltd Vs. Reliance Infrastructure Ltd & another), compensation under change in law cannot be connected to the coal price computed for the quoted energy charges. APTEL has held that change in law shall be computed with reference to the actual price of coal paid by the developer. Accordingly, the compensation on account of contribution to DMF and NMET shall be done with reference to the royalty calculated on the actual price of coal. The Petitioner shall furnish copies of the payment made, supported by Auditor certificate, while claiming the expenditure under Change in Law. The reimbursement on account of contribution to National Mineral Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to appropriate authorities. It is clarified that the Petitioner shall be entitled to recover on account of payment to National Mineral Exploration Trust and Payment to District Mineral Foundation in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If actual generation is less than the scheduled

generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law.

(B) Increase in Sizing Charges and Surface Transportation charges by Coal India Limited

(i) Increase in sizing charges

44. The Petitioner has submitted that at the time of cut-off date, i.e. 27.2.2013, the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means were Rs. 39 per metric tonne, Rs. 61 per metric tonne, and Rs. 77 per metric tonne respectively. Subsequently, Coal India Limited vide its Price Notification No. CIL: S&M: GM (F): Pricing 2784 dated 16.12.2013 increased the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means to Rs. 51 per metric tonne, Rs. 79 per metric tonne and Rs. 100 per metric tonne respectively. Thereafter, Coal India Limited vide its Price Notification No. CIL: S&M GM(F):Pricing/2017/766 dated 31.8.2017 further increased the sizing charges for (a) 200-250 mm of coal; (b) less than 100 mm of coal; and (c) less than 50 mm of coal through manual facilities or mechanical means to Rs. 56 per metric tonne, Rs. 87 per metric tonne and Rs. 110 per metric tonne respectively.

45. The Petitioner has submitted that the increase in sizing charges of coal as stated above by Coal India Limited vide Price Notifications dated 16.12.2013 and 31.8.2017 are a Change in Law event occurring after 7 days prior to the bid submission date, within the meaning of Article 10.1 of the PPA. The Petitioner has claimed an amount of Rs. 2.53 crore on account of increase in rate of sizing charges of coal from 1.1.2016 to 30.9.2018.

(ii) Increase in surface Transportation charges

46. The Petitioner has submitted that at the time of cut-off date, the surface transportation charges of coal by the coal companies was Rs. 44 per tonne for a distance of more than 3 kms but not more than 10 kms from the loading point; and was Rs. 77 per tonne for a distance of more than 10 kms but not more than 20 kms from the loading point. Subsequently, Coal India Limited vide its Price Notification No. CIL: S&M: GM (F): Pricing 2340 dated 13.11.2013 increased the surface transportation charges for (a) for a distance of more than 3 kms but not more than 10 kms from the loading point; and (b) for a distance of more than 10 kms but not more than 20 kms from the loading point to Rs. 57 per tonne and Rs.116 per tonne respectively. The Petitioner has submitted that surface transportation charges of coal by the Coal India Limited vide Price Notification dated 13.11.2013 is a Change in Law event within the meaning of Article 10.1 of the PPA. The Petitioner has claimed an amount of Rs. 2.81 crore on account of increase in surface transportation charges of coal from 1.1.2016 to 30.9.2018.

47. The issue pertaining to sizing and crushing charges has been dealt by this Commission earlier in various Petitions. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of increase in sizing and crushing charges and surface transportation charges as under:-

> *"93. We have considered the submissions of the Petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under Para 9.0, the delivery price of coal for coal supply pursuant to the Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-*

"9.2.1 Transportation Charges: Where the coal is transported by the seller beyond the distance of 3(three) kms from Pithead to the Delivery Point, the Purchaser shall pay the transportation charges as notified by CIL/seller from time to time.

9.2.2 Sizing/Crushing Charges Where coal is crushed/sized for limiting the top-size to250 mm or any other lower size, the purchaser shall pay sizing/crushing charges, as applicable and notified by CIL/seller from time to time."

Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law."

48. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to increase in Sizing and Crushing Charge and Surface Transportation Charges. The relevant portions of the judgment of the Appellate Tribunal dated 14.8.2018 in Appeal No. 111 of 2017 (GMR Warora Energy Limited versus CERC &Ors) is extracted as under:

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgement. In our opinion the findings of this Tribunal in the said judgement are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:

Sizing Charges:
"11. A

xvii. .....
The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL

xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

Transportation Charges :

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant."

xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

49. In line with the above decisions of the Commission and the Appellate Tribunal, the claim of the Petitioner for relief under "Change in Law" in respect of sizing/ crushing charges and surface transportation of coal, is disallowed.

(C) Clean Energy Cess

50. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of Clean Energy Cess on lifting and dispatch of coal was Rs. 50 per MT which was notified vide Notification No. 3/2010-Clean Energy Cess, dated 22.6.2010 issued by the Department of Revenue, Ministry of Finance, Government of India. Subsequently, Department of Revenue, Ministry of Finance vide its notification No. 1/2015-Clean Energy Cess dated 1.3.2015 enhanced the rate of Clean Energy Cess from Rs. 50 per MT to Rs. 200 per MT. By Section 232 of the Finance Bill, 2016, Clean Energy Cess has been named as 'Clean

Environment Cess' and has further increased from Rs 200 per MT to Rs. 400 per MT with effect from 1.3.2016. The Petitioner has submitted that due to above increase in the rate of Clean Energy Cess on lifting and dispatch of coal, the cost of supply of power by the Petitioner to the TANGEDCO under PPA has increased and, therefore, the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. Accordingly, the Petitioner has prayed that the notifications issued by Government of India, Department of Revenue, Ministry of Finance, after the cut-off date, fall within Change in Law event under the PPA and may be allowed.

51. We have considered the submission of the Petitioner. The Clean Energy Cess applicable at different point of time is as under:

From	To	Applicable Clean Energy Cess (Rs./ MT)
1.7.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	30.6.2017	400

52. It is noticed that Clean Energy Cess was introduced by the Government of India through the Finance Act, 2010 which was prior to the cut-off date in case of TANGEDCO PPA. As on the cut-off date i.e. 27.2.2013, Clean Energy Cess was applicable at the rate of Rs. 50/MT. It is noticed that Clean Energy Cess introduced by the Government of India has undergone various revisions from the year 2014 onwards. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in its various orders, namely, order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power Ltd. Vs. MPMCL and others), order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs. MSEDCL and others) and order dated 31.5.2018 in Petition No. 170/MP/2016 (KSKMPCL Vs. TANGEDCO) and the Commission had allowed the said claim as a

Change in Law event. The relevant portion of the order dated 31.5.2018 in Petition No. 170/MP/2016 is extracted as under:

> *"33 The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean energy cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean energy cess from TANGEDCO as per applicable rate of Clean energy cess in proportion to the coal consumed for generation and supply of electricity to TANGEDCO."*

53. The above said decision is also applicable in the case of the Petitioner in the instant case. Therefore, increase in Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover such increase in Clean Energy Cess from 1.1.2016 as per applicable rate of Clean Energy Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to TANGEDCO. As on the cut-off date, Clean Energy Cess was Rs. 50/MT which the Petitioner was expected to factor in the bid. Thereafter, the applicable rate of Clean Energy Cess for the purpose of change in law compensation computation shall be based on the relevant date/s on which changes in rate of Clean Energy Cess occurred. The change in law amount would be worked out, on the basis of the notified new rates less Rs. 50 as applicable as on cut of date, per MT of coal consumed. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), the computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually. It is pertinent to mention that the Clean Energy Cess has been abolished with effect from 1.7.2017. Accordingly, the Change in Law in Clean Energy Cess has been allowed up to 30.6.2017. With effect from 1.7.2017, the Petitioner shall be entitled for GST Compensation Cess in terms of the Commission's order dated 14.3.2018 in Petition No. 13/SM/2017.

(D) Increase in Busy Season Surcharge and Development Surcharge on transportation of coal by Rail

(i) Busy Season Surcharge

54. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of Busy Season Charges on transportation of coal by rail during the busy season was 12% on the applicable base freight rates published in the Indian Railway Conference Association Goods Tariff Part-II. Subsequently, vide circular No. 24 of 2013, the rate of Busy Season Charges was increased from 12% to 15% with effect from 18.9.2013. The Petitioner has submitted that there is an increase in the Busy Season Charges after the cut-off date due to revision of rate by the Railway Board, Ministry of Railway, GoI leading to an increase in cost of supply of power by the Petitioner to TANGEDCO and, therefore, the same amounts to Change in Law as per Article 10.1.1 of the PPA and the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. The Petitioner has claimed an amount of Rs. 2.28 crore on account of increase in levy of Busy Season Charges on transportation of coal by rail from 1.1.2016 to 30.9.2018.

(ii) Development Surcharge

55. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of development surcharge was 5% on the freight of transportation of coal by rail including certain components, namely (a) increase in Busy Season Surcharge (b) discount on rail freight for distance travelled up to 90 km and (c) increase in base rail freight. Even in the absence of any change of rate at which Development Surcharge is imposed, but due to rise in the base freight rate and Busy Season Charges, there has been an overall impact on the net out flow qua development surcharge in contradiction to what the Petitioner was liable to pay on cut-off date. Therefore, the same is covered within the meaning of Change in law as defined in Article 10.1.1 of the PPAs.

56. We have examined the matter. The Busy Season Surcharge and Development Surcharge levied by Railway Board have been allowed as a Change in Law events by APTEL vide its Judgment dated 14.8.2018 in Appeal No. 111 of 2017 & IA No. 450 of 2018 (GMR Warora case). APTEL in its Judgment dated 14.8.2018 has observed as under:

> *"xi...This Tribunal has concluded that the circulars issued by MOR have force of law. CERC escalation rate notifications cover only basic freight and other prevailing charges were to be factored in by APRL at the time of bidding. Accordingly any change in such surcharges/levy of new surcharge was to be treated as Change in Law event requiring compensation to be paid to APRL.*
>
> *xii. In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNH PPA. Accordingly, these issues are decided in favour of GWEL."*

57. In the light of above decision of APTEL, the claim of the Petitioner for relief on account of increase in Busy Season Surcharge and Development Surcharge is admissible as a Change in Law event under Article 10 of the PPAs. The Petitioner shall be entitled to recover the increase in Busy Season Surcharge and Development Surcharge in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in Busy Season Surcharge and Development Surcharge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to the Respondents. It is pertinent to mention that Busy Season Surcharge and Development Surcharge were being separately levied by Railways over and above basic freight. However, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the basic freight with

effective date of 15.1.2018. Accordingly, these surcharges would be allowable as change in law events only till 14.1.2018. With effect from 15.1.2018, these charges having been subsumed in the basic freight by Railways, are accounted for through the Escalation Indices published by the Commission, and the Petitioner is claiming it in terms of the escalable component of tariff quoted by it while bidding. Therefore, these charges can no longer be claimed under change in law w.e.f. 15.1.2018.

(E) Introduction and Enhancement of Service Tax on transportation of coal by Rail and Road

58. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, an abatement of 70% was permitted on freight for the taxable commodities i.e. coal and as such the service tax on transportation of coal by rail and road was 3.708% (Abatement at 70% of applicable 12.36% of service tax) on the total freight inclusive of all charges on coal as per the provisions of the Finance Act, 2010. According to the Petitioner, Ministry of Finance, Government of India vide its Notification No. 14/2015 IST dated 20.5.2015 increased service tax from 12% to 14% overall, with effect from 1.6.2015. Subsequently, Government of India, Ministry of Finance, Department of Revenue vide its Notification No. 21/2015-Service Tax dated 6.11.2015 increased the service tax from 14% to 14.5% due to promulgation of provision relating to Swachh Bharat cess on taxable service. The rate of Service Tax was further increased from 14.5% to 15% by amending Section 66B of the Finance Act, 1994, vide Finance Act, 2016 by which Krishi Kalyan cess was imposed and Ministry of Finance, Department of Revenue vide its Notification No. 31/2016-Service Tax dated 26.5.2016 issued the notification in this regard. The Petitioner has submitted that abatement of 70% permitted on freight for the taxable commodities i.e. coal vide Notification No. 26 of 2012 dated 20.6.2012 issued by the Ministry of Finance, GoI is still continuing and resultantly the Service Tax on transportation of coal has gone gradually up at 4.2%, 4.35% and 4.5% from 3.708%. As such, there is an increase in the service tax on

the transportation of coal by rail and road due to revision of rate of Service Tax by the Ministry of Finance, GoI leading to increase in cost of supply of power by the Petitioner to the Respondent. The Petitioner has submitted that the enhancement of Service Tax on transportation of coal by rail and road from 12% to 14% to 14.5% and then to 15% qualifies as Change in Law within the meaning of Article 10.1.1 of the PPAs. The Petitioner has submitted that due to said levy/increase in the service tax on the transportation of coal by rail and road, the cost of supply of power by the Petitioner to the Respondent under the PPA has increased and, therefore, the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The Petitioner has claimed an amount of Rs. 0.71 crore on account of increase in levy of Service Tax on transportation of coal by rail from 1.1.2016 to 30.6.2017.

59. We have considered the submissions of the Petitioner. The Petitioner has placed on record the concerned notifications. The Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 has held that service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant Para of the said order is extracted as under:

> *"89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable "to any person by another person, in relation to transport of goods by rail in any manner". Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut-off date in case of MSEDCL PPA. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act, 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act, 2009 which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the Petitioner is entitled for compensation in terms of the MSEDCL PPA. As on cut-off date in case of DNH PPA (i.e.1.6.2012), the service tax was on transportation of goods by Railways was in existence but was under exemption. Therefore,*

as on cut-off date in case of DNH PPA, the Petitioner could not have factored service tax on transportation of goods by Indian Railways which was under exemption. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law."

60. In the light of the above decision, the claim of the Petitioner for relief under Change in Law on account of service tax on transportation of goods by Indian Railways is admissible. Further, it is noted that w.e.f. 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable which is before the cut-off date i.e. 27.2.2013. Therefore, the Petitioner has accounted for 30% of 12.36% i.e. 3.708% at the time of submission of Bid. However, Ministry of Finance has revised the rates of service tax from 12.36% to 14% then to 14.5% and finally to 15%. In view of the above, the Petitioner is eligible for the relief as below:

Applicability date	Rate of Service tax	Service tax on transportation of goods @ 30% of Service tax	Admissible rate of service tax under Change in law
27.02.2013 (cut-off date)	12.36%	3.708%	0% (Petitioner has accounted 3.708% in its bid)
01.06.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016	15.00%	4.500%	0.792%

61. Subsequent to the enactment of the Central Goods and Service Tax Act, 2017, the service tax on transportation of coal has been subsumed in GST. Government of India, Ministry of Railways vide its Rate circular No. 19/2017 dated 30.6.2017 imposed 5% GST on goods and service for transportation of goods by Rail from 1.7.2017. The Petitioner has submitted that the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 had *inter alia* held that the introduction of GST and subsuming/ abolition of specific taxes, duties, etc. in GST is a change in law event. The Petitioner has prayed to allow the above

events as change in law. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess, initiated a suo motu Petition No. 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. The above decision of the Commission is applicable in the present case of the Petitioner.

62. The Petitioner shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(F) Introduction of Goods and Service Tax (GST) on coal

63. The Petitioner has submitted that in order to introduce a unified indirect tax structure in the form of Goods and Services Tax (GST), the Parliament has enacted the Goods and Services Tax Act, 2016 and 2.5% on amount of coal has been levied as the Central GST from 1.7.2017. The Petitioner has submitted that Government of Jharkhand vide its Notification No. 1/2017-State Tax (Rate) dated 29.6.2017 has levied an amount of 2.5% of the coal as Jharkhand GST from 1.7.2017. The Petitioner has submitted that the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 had inter alia held that the introduction of GST and subsuming/ abolition of specific taxes, duties, etc. in the

GST is a change in law event. The Petitioner has prayed to allow the above events as change in law.

64. We have considered the submission of the Petitioner. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess, initiated a suo motu Petition No. 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. The Commission in the above Petition vide order dated 14.3.2018 decided as under:

> *"32. At the same time GST and IGST were also introduced from 01.07.2017 and some of the taxes, duties and levies were abolished or subsumed therein. The Commission through the instant petition tried to ascertain the impact of the same on the generators and discoms/beneficiary States by seeking detailed submissions from all concerned.*
>
> *33. It has been observed that some of the generators and discoms have submitted the calculations of impact of change in law. These calculations show varying impact of such changes on different generators and discoms on various dates. The impact worked out by the discoms was different from that submitted by the generators. Further, the generators have also not submitted a clear declaration as called for that there are no other taxes, duties, cess etc., which have been reduced or abolished or subsumed. From the forgoing, the Commission feels that due to varied nature of such taxes, duties and cess etc. that have been subsumed/ reduced, it is not possible to quantify in a generic manner, the impact of change in law for all the generators.*
>
> *34. Hence, we are of the opinion that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/ beneficiary States. Since, these are change in law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.*
>
> *35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission."*

65. The above decision of the Commission is applicable in the present case of the Petitioner.

66. The Petitioner shall be entitled to recover the GST in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of GST. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(G) Levy of Evacuation Facility Charges

67. The Petitioner has submitted that Coal India Ltd. vide its price Notification No. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'Evacuation Facility Charges' at the rate of Rs. 50/MT to be levied on all despatches except despatch through rapid loading arrangement. The said charge is applicable on the procurement of coal by the Petitioner for the purpose of generating electricity. The levy of the said charges has been made effective from 20.12.2017, which is after the cut-off date. Levy of the said Evacuation Facility Charge has increased the cost of generation of electricity and the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. The Petitioner's claim on account of levy of Evacuation Facility Charges for the period 1.1.2016 to 30.9.2018 is Rs.1.86 crore.

68**.** We have considered the submission of the Petitioner. The Commission in its order dated 2.4.2019 in Petition No. 71/MP/2018 (GMRWEL vs MSEDCL &ors) has held as under:

"30. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility

Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of „evacuation facility charges" at the rate of Rs. 50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017 ELR(APTEL) 508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event."

69. The above decision of the Commission is also applicable in the present case.

70. Accordingly, the Petitioner is entitled to recover Evacuation Facility Charges from TANGEDCO as per applicable rates in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for generation and supply of electricity to TANGEDCO. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to TANGEDCO.

(H) Levy of Management Fee

71. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, there was no levy of Management Fee on coal. Subsequently, Government of Jharkhand vide Gazette Notification No. 80 dated 1.2.2018 imposed a new levy titled as Management Fee @Rs. 1/ton on coal w.e.f. 27.1.2018 under Rule 6 of the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017. The Petitioner has submitted that

said levy of Management Fee is covered within the meaning of change in law as defined in Article 10.1.1 of the PPA and the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPA. The Petitioner has claimed Rs. 0.03 crore on account of consequent levy of Management Fee from 1.1.2016 to 30.9.2018.

72. We have considered the submissions of the Petitioner. Mines and Mineral (Development and Regulation) Act, 1957 as amended in 2015 provides as under:

> ***"23C. Power of State Government to make rules for preventing illegal mining, transportation and storage of minerals****.—(1) The State Government may, by notification in the Official Gazette, make rules for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith.*
>
> *(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—*
>
> > *(a) establishment of check-posts for checking of minerals under transit;*
> > *(b) establishment of weigh-bridges to measure the quantity of mineral being transported;*
> > *(c) regulation of mineral being transported from the area granted under a prospecting licence or a mining lease or a quarrying licence or a permit, in whatever name the permission to excavate minerals, has been given;*
> > *(d) inspection, checking and search of minerals at the place of excavation or storage or during transit;*
> > *(e) maintenance of registers and forms for the purposes of these rules'*
> >
> > *(f) the period within which and the authority to which applications for revision of any order passed by any authority be preferred under any rule made under this section and the fees to be paid therefor and powers of such authority for disposing of such applications; and*
> >
> > *(g) any other matter which is required to be, or may be, prescribed for the purpose of prevention of illegal mining, transportation and storage of minerals.*
>
> *(3) Notwithstanding anything contained in section 30, the Central Government shall have no power to revise any order passed by a State Government or any of its authorised officers or any authority under the rules made under sub-sections (1) and (2)."*

73. Government of Jharkhand, Department of Industries, Mines and Geology in exercise of power conferred under Section 23C (1) and (2) of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 prescribing the Management

Fee of Rs. 1/MT for prevention of illegal mining, transportation and storage of mineral as under:

"6. Management Fees:

(i) A management fee of Rupees one per ton of mineral despatched shall be paid by the mining lease holders which will be deposited online through JIMMS portal. However, Department of Industries, Mines and Geology, Government of Jharkhand may revise the management fee by a notification.

(ii) The amount collected towards management fee may be provided from time to time in the expenditure budget of the Department of Industries, Mines & Geology under appropriate head of account. This fund shall be utilized to maintain and strengthen the JIMMS and prevention of illegal mining, transportation and storage or for the purpose as may be notified by the Department of Industries, Mines and Geology, Government of Jharkhand."

74. The amount collected through Management Fee is to be used for prevention of illegal mining, transportation, storage etc. This Fee on coal has been imposed through promulgation of the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 under Section 23C (1) and (2) of the Mines and Minerals (Development and Regulation) Act, 1957 and is payable by holders of mining lease. Government of Jharkhand is an "Indian Governmental Instrumentality" as defined in Article 1.1 of the PPA. This is covered under first bullet under clause 10.1.1 of the PPA that states, "the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law". In view of the above, levy of Management Fee by Government of Jharkhand through promulgating the aforesaid Rule is an event of change in law in terms of the PPA.

75. The Petitioner shall be entitled to recover Management Fee in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to TANGEDCO. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of

computation of impact of Management Fee. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

(I) Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of tax

76. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, VAT was levied at the rate of 5% under Jharkhand Value Added Tax Act, 2005 on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, Clean Energy Cess, Education Cess and Higher Education Cess. Though the rate of VAT remained unchanged, with the change in the rate at which the aforesaid components are levied, there has been an overall impact on the net tax outflow qua VAT in contradistinction to what the Petitioner was liable to pay at the cut-off date. As such, the same is Change in law event under Article 10 of the PPA and has resulted in the change in economic position of the Petitioner. The Petitioner has submitted that w.e.f. 1.7.2017 (with introduction of GST), Jharkhand VAT has been subsumed in the GST and w.e.f. 1.7.2017, 2.50% of Central GST is levied on coal as per the Jharkhand Goods and Service Tax. The Petitioner has submitted that the claim on account of levy of Jharkhand VAT (from 1.1.2016 to 30.6.2017) and Central GST (from 1.7.2017 to 30.9.2018) is Rs. 4.17 crore and Rs. 1.33 crore respectively.

77. We have examined the matter. The Petitioner has submitted the bills dated 7.11.2013 and 11.6.2017 raised by Central Coalfields Limited showing the levy of CGCT/ VAT @5% of total invoice value of coal. APTEL vide Judgment dated 19.4.2017 in Appeal No.161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 in the case of Sasan

Power Limited vs. CERC & Ors. has allowed VAT under Change in law. The observations of the APTEL as specified in Para 46 of the Judgment dated 19.4.2017 is quoted as under:

> *"46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event."*

78. In the light of above decision, the claim of the Petitioner for relief on account of Increase/ Change in Value Added Tax (VAT) is admissible to the Petitioner as a Change in Law event under Article 10 of the PPAs. The Petitioner shall be entitled to recover increase/ change in Value Added Tax (VAT) in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to the respondents. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Value Added Tax (VAT).

(J) Increase/ change in Central Excise Duty on account of changes in individual components

79. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the rate of Central Excise Duty @6.18% was applicable only on assessable value of coal on the summation of base price of coal, Royalty, Stowing Excise Duty, surface transportation charge and Sizing & Crushing charge as per the Central Excise Act, 1944. Ministry of Finance, Government of India vide its Notifications No. 14/2015 and 15/2015 dated 1.3.2015 revised the rate of Central Excise Duty from 6.18% to 6%. However, the overall burden in terms of the amount of money payable by the Petitioner towards Central Excise Duty has increased on account of increase in the components on which the Central Excise duty is calculated i.e. the summation of Central Excise Duty is leviable on summation of base price of coal, Royalty, Stowing Excise duty, Sizing and Crushing

charge, Surface Transportation chare, contribution to District Mineral Foundation and Contribution to the National Mineral Exploration Trust.

80. We have considered the submission of the Petitioner. Perusal of Notifications dated 1.3.2015 submitted by the Petitioner reveals that the Ministry of the Finance exempted all goods falling within the First Schedule to the Central Excise Tariff Act, 1985 from the whole of the Education Cess and Secondary & Higher Education Cess leviable under Finance Act, 2004 and 2007. The Petitioner neither submitted the details regarding levy of Central Excise Duty nor any Gazetted Notification issued by any Govt. body/ statutory authority regarding levy of Central Excise Duty on assessable value of coal on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge and Sizing charge and Crushing charge, in the absence of which, no view can be taken as regards the admissibility under change in law. Accordingly, the Petitioner is granted liberty to claim this expenditure under change in law through an appropriate application with relevant details.

(K) Carrying Cost

81. The Petitioner in its prayer at Para (c) has sought a direction to the Respondent to pay carrying cost @1.25% per month from the date on which the said amount became due to the Petitioner till the actual realization of the same to restore the Petitioner to the same economic position as existed prior to the change in law events.

82. We have considered the submission of the Petitioner. The Petitioner has submitted that the Petitioner should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law had not occurred. The Appellate Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (APL v CERC &ors) has allowed the carrying cost on the claim under change in law and held as under:

"*In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA…*

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.

Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority…"

83. The aforesaid judgment of the Appellate Tribunal was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 with Civil Appeal No. 6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld the directions of payment of carrying cost to the generator on the principles of restitution and held as under:

"*10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn.*

This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the

respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal…

16…There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC."

84. Article 10.2.1 of the PPA provides as under:

"10.2.1. While determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article10, the affected party to the same economic position as if such Change in Law has not occurred."

85. In view of the provisions of the PPA, the principles of restitution and the aforesaid judgment of the Hon`ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this Order, the provisions of Late Payment Surcharge in the PPAs would kick in if payment is not made by the Respondents within due date.

86. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L vs UHBVNL & ors) had decided the issue of carrying cost as under:

"24. After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

Period	*Actual interest rate paid by the Petitioner*	*Working capital interest rate as per CERC Regulations*	*LPS Rate as per the PPA*
2015-16	*10.68%*	*13.04%*	*16.29%*
2016-	*10.95%*	*12.79%*	*16.04%*

17			
2017-18	*10.97%*	*12.43%*	*15.68%*

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

26. The Petitioner shall work out the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount."

87. In line with above order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor`s Certificate) or the Rate of Interest on Working Capital rate as per applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the least.

Issue No. 5: The mechanism for compensation on account of Changes in Law during the operation period:

88. The Petitioner has submitted that the value of "Change in Law" is more than 1% of the Letter of Credit in aggregate for the relevant contract year. As per Article 8.4 of the PPA, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the monthly tariff payments of the previous contract year.

89. The Petitioner has submitted that the above levies, changes, revisions and enactments which are directly impacting the expenses of the Petitioner/ Seller is more than 1% of the value of the Standby Letter of Credit (LC) in aggregate for the relevant Contract Year. The Petitioner has further submitted that the aggregate amount claimed for

"Change in Law" for the period from 1.1.2016 to 30.9.2018 works out to Rs. 85.93 crore which is more than 1% of the LC amount for the respective period. As such, the same is more than the threshold amount prescribed under Article 10.3.2 of the PPA, and therefore, the Petitioner has submitted that it is entitled to be compensated for the same.

90. Articles 10.3.2 and 10.3.4 of the PPA provides for the principle for computing the impact of change in law as under:

> "*10.3.2 During Operating Period*
>
> *The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.*
>
> *10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2 and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law."*

91. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed.

92. However, it is clarified that the Petitioner shall be entitled to claim the compensation after the expenditures allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of Letter of Credit in aggregate and for this purpose the Petitioner shall furnish all the relevant documents like taxes and duties paid supported by Auditor Certificate.

93. The Article 10 of the PPAs provide for the principle for computing the impact of change in law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/ decrease in revenues or cost shall be admissible to the petitioner. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of

supply of power or from the date of Change in Law, whichever is later. Approaching the Commission every year for allowance of compensation for such Change in Law is a time consuming process, which may result in payment of carrying cost. We have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondent or from the date of Change in Law, whichever is later.

(b) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by procurers during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from TANGEDCO.

(c) For Change in Law events related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision of the PPA.

(d) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the procurers based on the scheduled energy.

Summary of Decision:

94. Based on the above analysis and decisions, the summary of our decision under the Change in Law during the operating period of the project is as under:

S.	Change in Law events	Decision
1.	Increase in the Rate of Royalty towards contribution to the National Mineral Exploration Trust and District mineral	Allowed

S.	Change in Law events	Decision
	Foundation	
2.	Increase in Sizing charges and Surface Transportation Charges on Coal	Not Allowed
4.	Increase in Clean Energy Cess	Allowed
5.	Levy of Busy Season Charges & Levy of Development Surcharge	Allowed
6.	Introduction of Service Tax on Transportation of coal by Rail and Road	Allowed
7.	Introduction of Goods and Service Tax (GST) on coal	Allowed
8.	Levy of Evacuation Facility Charges	Allowed
9.	Levy of Management Fee	Allowed
10.	Increase in Value Added Tax (VAT) on account of changes in individual components of tax	Allowed
11.	Increase/change in Central Excise Duty on account of changes in individual components	Liberty granted to approach the Commission along with full details
12.	Carrying cost	Allowed

95. The Petitioner is directed to ensure that it always has a composite scheme for generation and sale of electricity in more than one State in terms of Section 79 (1) (b) of the Act for this Order to remain valid.

96. Petition No. 17/MP/2019 is disposed of in terms of above.

Sd/-	sd/-	sd/-
(I.S.Jha)	**(Dr. M.K. Iyer)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**